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5 UNITED STATES DISTRICT COURT
6 WESTERN DISTRICT OF WASHINGTON
7 AT SEATTLE

8 DAVID RICHARD DANCE,)
9 Petitioner,) CASE NO. C17-0156RSM
10 v.) ORDER DENYING PETITIONER'S
11 UNITED STATES OF AMERICA,) MOTION UNDER 28 U.S.C. § 2255 TO
12 Respondent.) VACATE, SET ASIDE, OR CORRECT
13) SENTENCE BY A PERSON IN FEDERAL
14) CUSTODY
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I. INTRODUCTION

Before the Court is Petitioner's 28 U.S.C. § 2255 Motion to Vacate, Set Aside, or Correct Sentence. Dkt. # 1. Petitioner David Richard Dance challenges the 48-month sentence imposed on him by this Court after he pleaded guilty to one count of Wire Fraud in violation of 18 U.S.C. § 1343. *USA v. Dance*, CR15-0349RSM at Dkts. #6, #10 and #17. Petitioner now challenges his sentence on the basis of ineffective assistance of counsel. Dkt. #1 at 2-12. The Government opposes the motion, arguing that Petitioner has failed to prove an ineffective assistance of counsel claim. Dkt. #9. The Court has determined that no evidentiary hearing is necessary. *See* 28 U.S.C. § 2255(b). After full consideration of the record, and for the reasons set forth below, the Court DENIES Petitioner's § 2255 motion.

II. BACKGROUND

On November 2, 2015, Petitioner entered into a plea agreement wherein he agreed to plead guilty to one count of Wire Fraud in violation of 18 U.S.C. § 1343. CR15-0349RSM at

1 Dkt. #6. The agreement set forth the following elements of his crime: 1) that defendant devised
2 a scheme to defraud or to obtain money or property by means of false or fraudulent pretenses,
3 representations or promises; 2) that the statements made or facts omitted as part of the scheme
4 were material; 3) that defendant acted with the intent to defraud, that is, the intent to deceive or
5 cheat; and 4) that the defendant used, or caused to be used, an interstate wire communication to
6 carry out or attempt to carry out an essential part of the scheme. *Id.* at 2. As part of the agreement,
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8 Petitioner agreed that he was guilty of the charged offense, and agreed to the following facts:

9 From March 2005 through January of 2012, Defendant was the sole
10 managing member and president of 1031 ECI LLC, doing business as 1031
11 Exchange Coordinators (hereafter “1031 ECI”) in Bellevue, Washington.
12 Through 1031 ECI, Defendant engaged in the business of facilitating
13 exchanges of like-kind property under the Internal Revenue Code of the
14 United States. (With a 1031 exchange, a tax payer can postpone paying taxes
15 on the sale of certain investment properties so long as the sale proceeds are
16 properly reinvested into like-kind real property as part of a qualifying
17 exchange. To ensure that all provisions of the Code are followed, tax payers
18 can utilize an exchange facilitator serving as an intermediary who receives
19 the proceeds from the initial sale then facilitates the subsequent closing.)

20 When hired to serve as an exchange facilitator, Defendant, through 1031 ECI,
21 would enter into written agreements (collectively hereinafter “Facilitator
22 Agreement”) with clients who were selling and purchasing real estate as part
23 of a 1031 exchange. Defendant signed Facilitator Agreements in his capacity
24 as President of 1031 ECI. The Facilitator Agreement provided that “[f]unds
25 from closing shall be wired into 1031 Exchange Coordinators [sic] trust
26 account with Bancorp Bank,” “[f]unds from closing shall be wired into the
27 trust account specified by 1031 Exchange Coordinators where it will be
28 pooled with other exchange funds under \$500,000 unless requested
otherwise,” or:

Our policies on exchange funds and earnings follow certain state
laws and financial institution regulatory requirements. As a result
1031 Exchange Coordinators has determined to: (I) establish
separately identified accounts for exchange funds of \$500,000 or
more, with the exchanger receiving the interest, if any, from such
account; (II) to offer exchanger the option to have exchange funds
in the amounts less than \$500,000 placed in a pooled account
potentially yielding higher interest for exchanger. **Please initial
your selection of one of the choices below:**

1 ___ 1. For all accounts: A separately identified account with
2 minimal or no earnings;

3 Or

4 ___ 2. For accounts of \$500,000 or less: A pooled interest-
5 bearing account with potentially greater earnings;

6 Once the exchanger initials one of the above deposit choices,
7 1031 Exchange Coordinators shall secure such deposit account and
8 notify Exchanger in writing confirming the specific interest that
9 exchanger will receive upon deposit into such account (Interest rates
10 vary over the life of the exchange. The only thing we know at the
11 beginning is the initial interest rate).

12 The Facilitator Agreement provided that 1031 ECI would be paid a flat fee
13 (typically \$500 or \$1,000) for the first closing and up to the first three hours
14 of consultation as well as \$250 for each closing thereafter. The Facilitator
15 Agreement provided that if additional consulting was required, clients would
16 be billed at a rate of \$250 per hour for such consulting, and these fees would
17 be deducted from the funds held by 1031 ECI. In exchange, the Facilitator
18 Agreement provided 1031 ECI would use deposited funds to pay these fees
19 and acquire replacement properties identified by the client or, in the event no
20 replacement properties were acquired, 1031 ECI would return the funds. The
21 Facilitator Agreement did not provide that 1031 ECI would do anything else
22 with deposited funds.

23 The Facilitator Agreement created the impression that funds deposited by
24 1031 ECI clients would be secure and available to close exchanges or for
25 repayment in the event no exchanges were completed. Clients who deposited
26 funds with 1031 ECI understood the Facilitator Agreements to obligate 1031
27 ECI and Defendant to hold their funds during the period between the sale of
28 a relinquished property and the purchase of a replacement property, and
29 ultimately to return funds if no exchange was completed.

30 In actuality, Defendant did not maintain all the funds deposited by 1031
31 ECI's clients in trust and he did not intend to do so when he executed the
32 Facilitator Agreements. Rather, Defendant used some of these funds to make
33 investments and transferred some of these funds to non-client non-trust
34 accounts. Defendant did not provide 1031 ECI's clients with written
35 notification of how their funds were invested despite a requirement under
36 state law obligating him to do so of which Defendant was aware.

37 Included in these investments and transfers, from February through May of
38 2011, Defendant wired \$1,319,000 in funds from 1031 ECI's Bancorp trust
39 account to Brett Amendola. Amendola represented to Defendant that he was
40 developing a golf course and needed what he called "show money" to finalize
41 the project. On behalf of 1031 ECI, Defendant executed a written agreement
42 titled "Irrevocable Trust Agreement" whereby 1031 ECI would transfer funds

1 to an account where it would remain and serve as Amendola's 'show money'
2 for a few weeks. Amendola represented the account was an escrow account,
3 only Defendant could withdraw funds therefrom, and Defendant could
4 retrieve the funds at any time. In fact, the account provided by Amendola in
5 his wiring instructions was not an escrow account. Instead, Amendola
6 provided a similarly named account and he thereby stole the funds deposited
7 by 1031 ECI. Brett Amendola pled guilty to committing this wire fraud in
8 the Eastern District of Virginia and was sentenced to 84 months in prison.

9 During his dealings with Amendola and after Amendola failed to return the
10 funds Defendant wired to him, Defendant continued to take on new 1031 ECI
11 clients. Using the Facilitator Agreements, Defendant caused clients L.A.,
12 O.S., H. and M.A., F.C., J.H., E.K., W.L., L. and L.S., G. and G.V., and Y.V.
13 to deposit funds totaling in excess of \$7,000,000 in 2011. All these funds
14 were initially placed in the same 1031 ECI Bancorp trust account despite a
15 requirement under state law that client funds over \$500,000 shall be deposited
16 in separately identified accounts of which Defendant was aware.

17 During 2011, Defendant became aware of Amendola's fraud. Defendant did
18 not immediately communicate this material fact to all of the then-existing
19 1031 ECI clients or to subsequent 1031 ECI clients. Given the transfers to
20 Amendola and other investments by 1031 ECI, the balance of funds in 1031
21 ECI's Bancorp trust account in 2011 was insufficient to fund all 1031 ECI's
22 client's exchanges or repay all 1031 ECI's clients' deposited funds in the
23 event no exchanges were completed. Defendant was aware of this material
24 fact but chose not to disclose it to 1031 ECI clients. Based on this material
25 omission and the representations in the Facilitator Agreements, clients
26 continued to entrust additional funds to Defendant and 1031 ECI throughout
27 2011. During this time, Defendant intentionally used funds deposited by
28 1031 ECI clients including L.A., O.S., H. and M.A., F.C., J.H., E.K., W.L.,
L. and L.S., G. and G.V., and Y.V. to close other clients' exchanges and to
repay money to clients who did not finish completing their exchanges as
required by the Internal Revenue Code.

For example, by October 6, 2011, 1031 ECI's Bancorp trust account balance
was \$0, despite the fact that 1031 ECI still then had numerous clients with
pending or anticipated exchanges proceeding. On October 17, 2011,
Defendant executed a 1031 ECI Facilitator Agreement with F.C. providing
his "[f]unds from closing shall be wired into the trust account specified by
1031 Exchange Coordinators where it will be pooled with other exchange
funds." Defendant did not disclose material facts to F.C. concerning the
funds transferred to Amendola, the balance in the 1031 ECI Bancorp trust
account, or the 1031 ECI clients with pending or anticipated exchanges then
pending. Based on these material omissions and the representations in the
Facilitator Agreement, F.C. conducted an interstate wire transfer of
\$320,514.40 belonging to F.C. from North Cascades Bank located in

1 Washington, to the 1031 ECI Bancorp trust account in Delaware. Defendant
2 intentionally used these funds to close other 1031 ECI clients' exchanges and
3 make repayments in cases where exchanges were not completed. By
4 December 6, 2011, 1031 ECI's Bancorp trust account balance was \$8.63 and
5 F.C. had not yet completed his exchange or received any repayment. When
6 F.C. requested return of the funds he had deposited with 1031 ECI, Defendant
7 told him the funds had been lost.

8 As a result of this scheme to obtain money by means of material false or
9 fraudulent pretenses, representations, and promises, Defendant fraudulently
10 obtained approximately \$3,200,000 in funds deposited by 1031 ECI clients
11 including L.A., O.S., H. and M.A., F.C., J.H., E.K., W.L., L. and L.S., G. and
12 G.V., and Y.V.

13 Dkt. #6 at 4-7.

14 In addition, the parties agreed that the following Sentencing Guidelines provisions apply
15 to this case:

- 16 a. A base offense level of seven (7) pursuant to USSG § 2B 1.1 (a)(1).
- 17 b. A sixteen (16) level enhancement pursuant to USSG § 2B 1.1 (b)(1) for a loss
18 amount exceeding \$1,500,000.
- 19 c. A two (2) level enhancement pursuant to USSG § 2B 1.1 (b)(2)(a)(i) for involving
20 more than ten victims.

21 *Id.* at 8.

22 Petitioner also agreed to pay restitution to the individuals harmed by his criminal conduct,
23 which the government estimated to be approximately \$3.2 million at the time. *Id.* at 9.

24 On February 4, 2016, this Court held Petitioner's sentencing hearing. Dkt. #16.
25 Petitioner was represented by his attorney, Cassandra Stamm, at that hearing. Dkts. #16 and #25.
26 Ms. Stamm argued at the sentencing that Petitioner had not benefitted from the fraud, and that
27 the monies actually went to clients and business-related expenses. Dkt. #25 at 8:1-18. She
28 further argued that any cover up of the fraud was perpetuated by Mr. Amendola, not by Petitioner.

1 Dkt. #25 at 8:19-9:2. In addition, Ms. Stamm distinguished Petitioner's actions from those made
2 by people running traditional Ponzi schemes, noting that Petition was working with attorneys
3 during the time period of Mr. Amendola's fraud, and they all believed the money would be
4 coming back and everything would be fixed. *Id.* at 9:24-10:7. After listening to four of the
5 victims speak, as well as Petitioner, the Court ultimately imposed a sentence of 48-months of
6 custody. *Id.* at 42:14-17. Because the parties were not prepared with a final restitution amount
7 at that time, a restitution hearing was set for a later date. *Id.* at 6:11-7:8 and 42:19-43:7.
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9 On September 22, 2006, this Court held Petitioner's restitution hearing. Dkt. #44.
10 Petitioner was represented by his new attorney, Jesse Cantor, at that hearing. *Id.* The Court set
11 a restitution amount of \$2,767,150.91. *Id.*
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13 On February 2, 2017, Petitioner filed the instant motion arguing that his sentence should
14 be reduced due to ineffective assistance of counsel. The motion is now ripe for review.
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16 **III. DISCUSSION**

17 **A. Standard On Motion Under 28 U.S.C. § 2255**

18 A motion under 28 U.S.C. § 2255 permits a federal prisoner, in custody, to collaterally
19 challenge his sentence on the grounds that it was imposed in violation of the Constitution or laws
20 of the United States, or that the Court lacked jurisdiction to impose the sentence or that the
21 sentence exceeded the maximum authorized by law. Petitioner challenges his sentence on the
22 grounds that he received ineffective assistance of counsel during his trial. The Court finds that
23 Petitioner is not entitled to an evidentiary hearing in this matter because the Petition, files, and
24 totality of the record conclusively demonstrate that Mr. Dance is not entitled to relief. *See United*
25 *States v. Howard*, 381 F.3d 873, 877 (9th Cir. 2004).
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B. Standard of Review for Ineffective Assistance Claims

Petitioner argues that his counsel was deficient in three phases of his case: 1) investigating the case prior to the Plea Agreement; 2) responding to the government's sentencing memorandum; and 3) at sentencing. Dkt. #1-1 at 6. Specifically, he asserts that he was denied his right to effective assistance of counsel when:

1. his counsel failed to conduct a competent investigation into the losses attributable to his conduct;
2. his counsel failed to notify him that the loss amount should be the proximate cause and directly foreseeable as a result of his conduct;
3. his counsel failed to respond to the government's new and false allegations contained in the sentencing memorandum;
4. his counsel failed to call a material witness at sentencing;
5. his counsel failed to object to new and false allegations made by the government and in witness testimonies;
6. his counsel failed to allow him to rebut the government's false allegations in his final statement; and
7. the cumulative errors in this case violated his right to effective assistance of counsel.

Dkt. #1-1 at 15-41.

On Reply in support of his motion, Petitioner states that he is "not attacking the sufficiency of the Information or the validity of his plea agreement – just the additional uncharged offenses outside of the stipulated facts, the manner and timing of when they originated, and the material misstatements of the fact [sic] upon which the length of his sentence was determined."

Dkt. #15 at 3.

1 To establish a claim for ineffective assistance of counsel, Petitioner must prove (1) that
2 counsel's performance was deficient and, (2) that the deficient performance prejudiced the
3 defense. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). In order to establish that counsel's
4 performance was deficient, a petitioner must show that counsel's performance fell below an
5 objective standard of reasonableness. *Id.* at 688. There is a strong presumption that counsel was
6 within the range of reasonable assistance. *Id.* at 689. In order to establish that counsel's
7 performance prejudiced the defense, a petitioner "must show that there is a reasonable probability
8 that, but for counsel's unprofessional errors, the result of the proceeding would have been
9 different. A reasonable probability is a probability sufficient to undermine confidence in the
10 outcome." *Id.* at 694.
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13 *1. Grounds One and Two*

14 On Grounds One and Two of his Petition, Petitioner argues that his counsel failed to
15 conduct a competent investigation into the losses attributable to his conduct, and that his counsel
16 failed to notify him that the loss amount should be the proximate cause and directly foreseeable
17 as a result of his conduct. Dkt. #1-1 at 15-22. More specifically, Petitioner asserts that his counsel
18 was deficient because 1) she failed to ask him what he thought the losses and victims were that
19 resulted from his conduct; 2) she failed to recognize that the \$3.2 million loss proposed by the
20 government included the loss attributable to Mr. Amendola's fraud; 3) she failed to interview
21 bankruptcy judge Michael McCarty; 4) had she properly investigated she would have determined
22 that two of the alleged victims were no longer bound by their 1031 agreements and they did not
23 conduct any transactions after the Amendola fraud was discovered; and 5) had she interviewed
24 the lawyers at Beresford Booth she would have been more able to assist Petitioner in presenting
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1 why Petitioner kept his business operating after the Amendola fraud was discovered. Dkt. #1-1
2 at 17-19.

3 The record does not support these assertions. Indeed, prior to pleading guilty, Mr. Dance
4 discussed his concerns with his counsel in an email entitled “Net Amount Lost Calculations.”
5 Dkt. #1, Ex. M. That discussion centered on loss amount, and the difference between loss amount
6 and restitution. *Id.* Counsel explained that some loss amounts could possibly be reduced if Mr.
7 Dance could show proof of repayment prior to the time the offense was detected, but that she
8 could not see a way of reducing the entire loss amount below \$1.5 million. *Id.* She noted that
9 pleading guilty to any amount between \$1.5 and \$3.5 million would count the same for
10 sentencing purposes. *Id.* In his plea agreement, Defendant acknowledged that restitution might
11 be lower than the loss amount. Case No. CR15-0349RSM, Dkt. #6 at ¶ 12. Further, in his plea
12 agreement, Mr. Dance conceded that he began misusing employee funds since at least February
13 2011, that he transferred client funds to Brett Amendola without permission, and that he used
14 client funds for personal investments and to pay off pre-existing clients. *Id.* at ¶ 7.

15 Mr. Dance complains that his counsel failed to ask him what he thought the losses and
16 victims were that resulted from his conduct. This argument is disingenuous given that he read
17 the Information and agreed to the facts in the plea agreement, so he had full knowledge of what
18 he was pleading to. Further, as discussed above, he had a discussion with his counsel about the
19 loss amount prior to signing that plea agreement. Likewise, Mr. Dance alleges that his counsel
20 was ineffective because she failed to recognize that the \$3.2 million loss proposed by the
21 government included the loss attributable to Mr. Amendola’s fraud. However, this allegation is
22 completely rebutted by the Information and the plea agreement, which both clearly state that part
23 of Mr. Dance’s fraudulent scheme entailed wiring client funds to Mr. Amendola, which were
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1 then stolen by Mr. Amendola. Similarly, Mr. Dance's argument that P.L., E.K., and G.V.P.
2 would not have constituted victims if counsel had investigated further, is also contradicted by the
3 facts agreed to by Dance in the plea agreement. Again, Mr. Dance specifically pleaded guilty to
4 the facts in the plea agreement supporting their loss amounts.

5 Mr. Dance then argues that his counsel was deficient because she failed to interview the
6 bankruptcy judge who presided over the bankruptcy of his corporation. Mr. Dance asserts that
7 had she conducted such interview, she would have learned that victim Y.V. received a property
8 out of the bankruptcy that should have been valued at \$300,000, which effectively covered her
9 losses, and which should have removed her as a victim for the total loss calculation. Mr. Dance
10 does not support this allegation with any evidence of the property value at the time, or other
11 admissible evidence demonstrating that victim Y.V. had been fully compensated for her loss.
12 Thus, this allegation is speculative and conclusory, and is therefore insufficient to prove that
13 counsel provided ineffective assistance. *Blackledge v. Allison*, 431 U.S. 63, 74, 97 S. Ct. 1621,
14 52 L. Ed. 2d 136 (1977); *James v. Borg*, 24 F.3d 20, 26 (9th Cir. 1994).
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16 Mr. Dance next argues that his counsel should have interviewed the lawyers at Beresford
17 Booth who assisted him with the attempted recovery of the funds stolen by Mr. Amendola. He
18 asserts that such an interview would have revealed information about why Mr. Dance kept the
19 1031 ECI business running after he discovered that the funds had been stolen, and would have
20 therefore refuted any allegation that he was running a Ponzi scheme. It is not clear how the
21 information would have changed the calculation of any loss amount in the plea agreement. Mr.
22 Dance appears to suggest that an interview with the Beresford Booth attorneys would have
23 revealed other bank accounts and assets available at the time to cover the \$1.3 million lost to Mr.
24 Amendola, such that Mr. Dance was not running a Ponzi scheme to cover those losses. *See* Dkts.
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1 #1-1 at 19 and #15 at 13-14. However, Mr. Dance fails to address the fact that he signed a plea
2 agreement setting forth specific statements of fact supporting a “scheme” over a lengthy period
3 of time, and that he did take in funds to cover client losses during that period of time. This is
4 significant, as the Ninth Circuit Court of Appeals has explained:

5 While this is an issue of first impression in this circuit, it has been raised in
6 three of our sister circuits and they have reached the identical conclusion. In
7 *United States v. Massey*, 48 F.3d 1560, 1566 (10th Cir. 1995), the Tenth
8 Circuit rejected the defendant’s argument that “scheme or artifice to defraud”
9 in 18 U.S.C. § 1341 is limited to each individual, defrauded client. The court
10 wrote, “To the contrary, ‘scheme to defraud’ has a wider meaning than an
11 individual act of fraud. A scheme refers to the overall design to defraud one
12 or many by means of a common plan or technique.” *Id.* at 1566. *See also*
13 *United States v. Morelli*, 169 F.3d 798, 806-07 (3d Cir. 1999) (“We think the
14 money was the proceeds of the entire ongoing fraudulent venture . . . and that
this venture was a wire fraud scheme.”); *United States v. Tencer*, 107 F.3d
1120, 1131 (5th Cir. 1997) (“Because the money laundering counts do not
define ‘specified unlawful activity’ in terms of the mail fraud activities
described in counts 2-18, this court is not limited to considering only those
activities.”).

15 *United States v. Rogers*, 321 F.3d 1226 (9th Cir. 2003).

16 Finally, Mr. Dance argues that his counsel was ineffective because she failed to inform
17 him about the law governing the calculation of loss amounts. Dkt. #1-1 at 20-22. Specifically,
18 Mr. Dance asserts that he was not aware of a case that held a defendant can only be required to
19 pay restitution for amounts that were “directly” and “foreseeable” from his criminal conduct. *Id.*
20 Mr. Dance asserts that he never would have pleaded guilty to a “general” loss amount of \$3.2
21 million if he had been aware of that case prior to his plea. *Id.* As discussed above, Mr. Dance’s
22 counsel attempted to explain to him the difference between loss and restitution amounts, which
23 are different. Moreover, Mr. Dance himself provides email correspondence between his counsel
24 and the government discussing restitution amounts in light of the case of which Mr. Dance now
25 asserts he was unaware; thus, even if counsel did not communicate to Mr. Dance the specific
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1 case law that informed the calculation in the plea, it is clear that his counsel was aware of the
2 standard for calculating restitution and actively negotiating with the government based on that
3 standard. The Court is not aware of any legal authority, and Mr. Dance has offered none, that
4 requires counsel to provide clients with specific case citations in order to be effective.

5 When determining whether the degree of investigation conducted by defense counsel is
6 reasonable, the Supreme Court has held that:
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8 [S]trategic choices made after thorough investigation of law and facts
9 relevant to plausible options are virtually unchallengeable; and strategic
10 choices made after less than complete investigation are reasonable precisely
11 to the extent that reasonable professional judgments support the limitations
12 on investigation. In other words, counsel has a duty to make reasonable
investigations or to make a reasonable decision that makes particular
investigations unnecessary.

13 *Strickland*, 466 U.S. at 690-691. For the reasons discussed above, Mr. Dance has failed to
14 demonstrate that his counsel's investigation was deficient, or that the strategic choices made with
15 respect to the plea agreement were made after any inadequate investigation. As a result, Mr.
16 Dance's Petition on Grounds One and Two fails.

17 2. *Ground Three*

18 Mr. Dance next argues that his counsel was deficient when she failed to respond to ten
19 "new and false" allegations contained in the government's sentencing memorandum. Dkt. #10-
20 1 at 23-35. This claim primarily focuses on the victim loss calculation, and the government's
21 characterization of his various actions. *Id.* Having reviewed Mr. Dance's arguments, and the
22 plea agreement in this matter, the Court agrees with the government that Mr. Dance fails to
23 establish that these allegedly "new and false" allegations were actually false, or that they had a
24 material impact on sentencing.
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1 As an initial matter, the Court notes that several of these “new and false” statements, are
2 simply recitations of facts set forth in the plea agreement. For example, Mr. Dance objects to the
3 following:

4 (1) “Had Mr. Dance reported the Amendola fraud immediately and not
5 engaged in the repayment scheme, his client losses would have amounted to
6 \$1,319,000. Instead, Mr. Dance’s actions to fraudulently cover up his misuse
of the funds led to a much steeper loss of over \$3,200,000.”

7 (2) “. . . [Dance’s] cover-up...directly caused a multiplication in the damage
8 to his clients, leaving many more victims in its wake.”

9 (3) “Mr. Dance soon became unable to repay clients and closed the business,
10 leaving clients L.A., O.S., H. and M.A., F.C., J.H., E.K., W.L., L. and L.S.,
11 G. and G.V., and Y.V. with losses exceeding \$3,200,000.”

12 Dkt. #1-1 at 23-26. The plea agreement states that “from February through May of 2011,
13 Defendant wired \$1,319,000 in funds from 1031 ECI’s Bancorp trust account to Brett Amendola
14 . . .”, and that, as a result, “the balance of funds in 1031 ECI’s Bancorp trust account in 2011 was
15 insufficient to fund all 1031 ECI’s client’s exchanges or repay all 1031 ECI’s clients deposited
16 funds in the event no exchanges were completed.” Case No. CR15-0349RSM, Dkt. #6 at ¶ 7.
17 The stipulated facts then conclude: “[a]s a result of this scheme to obtain money by means of
18 material false or fraudulent pretenses, representations, and promises, Defendant fraudulently
19 obtained approximately \$3,200,000 in funds deposited by 1031 ECI clients including L.A., O.S.,
20 H. and M.A., F.C., J.H., E.K., W.L., L. and L.S., G. and G.V., and Y.V.” *Id.* Thus, none of
21 these three statements can be characterized as “new” or “false.”
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24 Mr. Dance then objects to the characterization of his conduct as a Ponzi scheme. Dkt.
25 #1-1 at 27. Mr. Dance specifically objects to the statement in the government’s sentencing
26 memorandum that, “[t]o avoid having to disclose the significant loss arising from the Amendola
27 investment, Mr. Dance eventually turned to using incoming client funds to pay back pre-existing
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1 clients whose funds he had lost through these unauthorized investments. This repayment scheme
2 could not sustain itself, as it relied upon a steady stream of new clients with sufficient funds to
3 finance numerous pre-existing obligations.” Dkt. #1-1 at 27. Likewise, Mr. Dance objects to the
4 statement that, “[r]ather than coming clean to his clients and/or reporting Mr. Amendola to the
5 authorities, Mr. Dance chose to run his business as a Ponzi scheme.” *Id.*

7 While Mr. Dance may object to the term “Ponzi scheme,” he pleaded guilty to
8 “intentionally us[ing] funds deposited by 1031 ECI clients...to close other clients’ exchanges and
9 to repay money to clients who did not finish completing their exchanges as required by the
10 Internal Revenue Code.” Case No. CR15-0349RSM, Dkt. #6 at ¶ 7. The actions of paying
11 existing clients with funds from new clients, is analogous to the classic definition of a Ponzi
12 scheme, which is “commonly used to refer to a fraudulent investment scheme in which early
13 investors are paid with sums obtained from later ones.” *United States v. Ruskjer*, 2011 U.S. Dist.
14 LEXIS 96902 (D. Haw. Aug. 29, 2011), *See Black’s Law Dictionary* 1198 (8th ed. 2004); *Donell*
15 *v. Kowell*, 533 F.3d 762, 767 n.2 (9th Cir. 2008); *United States v. Behrens*, 2009 U.S. Dist. LEXIS
16 124741, 2010 WL 427784, at *3 (D. Neb. 2010) (“A ‘Ponzi scheme’ is merely a lay-term used
17 to describe a variety of fraud.”). Further, as noted above, Ms. Stamm distinguished Petitioner’s
18 actions from those made by people running traditional Ponzi schemes, noting that Petition was
19 working with attorneys during the time period of Mr. Amendola’s fraud, and they all believed
20 the money would be coming back and everything would be fixed. *Id.* at 9:24-10:7. Thus,
21 Plaintiff cannot demonstrate that these statements were “false,” or that there would have been
22 any different outcome if his counsel had objected to the government’s terminology.

26 Mr. Dance also asserts that his counsel should have objected to the way that the
27 government characterized his intent. Specifically, he objects to the following statements:
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1 Mr. Dance appears to have believed that he could place client funds under his
2 safekeeping into an outside escrow account, receive kickbacks from Mr.
3 Amendola for doing so and then move the funds back to the 1031 ECI trust
4 account, all without notifying any 1031 ECI client about this conduct, and
presumably with the goal that no client would ever realize that their funds
had been transferred.

5 Thus, while Mr. Dance did not initially intend to lose or steal his client's
6 funds, he did intend to personally benefit from the payments that Mr.
7 Amendola made, and indeed received the payments from Mr. Amendola in
the 1031 ECI operating account at Frontier/Union bank.

8 This personal benefit appears to be what drove Mr. Dance to invest client
9 funds in an unauthorized manner. Though Mr. Dance may have thought his
10 investment with Mr. Amendola was fairly safe, and therefore a reasonable
risk, this calculation was not his to make as the funds belonged to his clients.

11 Dkt. #1-1 at 28-29. Mr. Dance argues that he did not receive "kickbacks" from Mr. Amendola,
12 that he did not intend to benefit from the payments made to Mr. Amendola, and that it was his
13 right to invest funds with an escrow account according to accepted custom and practice. *Id.*

14 Again, even though Mr. Dance objects to the government's characterization of his intent,
15 he fails to demonstrate that there would have been a different outcome had his counsel objected.
16 In the plea agreement, Mr. Dance agreed that "[i]n actuality, Defendant did not maintain all the
17 funds deposited by 1031 ECI's clients in trust and he did not intend to do so when he executed
18 the Facilitator Agreements. Rather, Defendant used some of these funds to make investments
19 and transferred some of these funds to non-client non-trust accounts." Case No. CR15-
20 0349RSM, Dkt. #6 at ¶ 7. Moreover, the Information to which Mr. Dance pleaded guilty charged
21 that the scheme to defraud was premised on Mr. Dance intending to "use the funds that he
22 obtained as a result of the scheme to fund personal investments and to repay other clients." Case
23 No. CR15-0349RSM, Dkt. #1. There is no authority precluding the government from drawing
24 inferences from the facts in these documents to make its arguments to the Court with respect to
25 sentencing.
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1 Finally, Mr. Dance objects to the government arguing that “many of the victims in this
2 case still suffered a financial catastrophe...”, and “[r]ather than closing the business at the time,
3 or notifying incoming clients of the risks, Mr. Dance proceeded with business as usual.” Dkt.
4 #1-1 at 30-32. Mr. Dance essentially argues that some of his victims had other assets worth far
5 more than their losses, so that they did not in fact suffer a “catastrophe.” Specifically, he points
6 to H.A., M.A., Y.V. and G.V.P. Dkt. #1-1 at 31. Mr. Dance also argues that he conducted
7 “business as usual” because he had other accounts and assets to cover the initial loss to Mr.
8 Amendola, which allowed him to continue his business. *Id.* at 31-32.

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10 Mr. Dance may not choose to use the word “catastrophe” to describe what his victims
11 suffered. However, he has failed to provide any legal authority precluding the government from
12 using such a descriptor. Moreover, he fails to demonstrate that any objection by his counsel to
13 the use of that word would have resulted in any outcome. The same is true for the use of the
14 phrase “business as usual.”

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16 For all of these reasons, Mr. Dance has failed to demonstrate that his counsel’s failure to
17 object to these ten statements in the government’s sentencing memorandum was ineffective. As
18 a result, Mr. Dance’s Petition on Ground Three fails.

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20 *3. Grounds Four, Five and Six*

21 Mr. Dance next argues that his counsel was deficient at the sentencing stage, when his
22 counsel: 1) failed to call a material witness at sentencing; 2) failed to object to new and false
23 allegations made by the government and by witnesses; and 3) failed to allow him in his final
24 statement to the Court to rebut the government’s false allegations. Dkt. #1-1 at 35. Specifically,
25 Mr. Dance argues that his counsel should have presented his son Jeffrey Dance as a witness, that
26 counsel should have presented rebuttal evidence to Mr. Asmussen’s assertion that stress from the
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1 financial loss led to his wife's death, that counsel should have objected to the government
2 characterizing his actions as "stealing directly" from his clients, and that counsel should have
3 allowed him to rebut the government's statements in order to provide the court with "meaningful
4 information" about his clients' net worth in comparison with their losses. *Id.* at 36-39.

5 As the government noted, Mr. Dance bears the burden of proving both that his attorneys'
6 decisions fell "outside the wide range of professionally competent assistance" and that "there is
7 a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding
8 would have been different." *Strickland*, 466 U.S. at 690, 694. The Court agrees that the strategic
9 decisions presented by Mr. Dance demonstrate neither.
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11 Mr. Dance asserts that his counsel called no witnesses and directed him to remain quiet.
12 Yet the record demonstrates that a friend of Mr. Dance did speak at sentencing, and Mr. Dance
13 also spoke on his own behalf. Case No. CR15-0349RSM, Dkt. #25 at 14-22 and 33-36. With
14 respect to Mr. Dance's complaint that his son was not allowed to speak at his sentencing, Mr.
15 Dance fails to demonstrate what information his son would have provided or how that would
16 have materially changed the outcome of the proceedings. Indeed, counsel apparently conveyed
17 to Mr. Dance that his son did not need to testify because he would not present any new
18 information. Dkt. #1-1, Ex. A at ¶ 13. Jeffrey Dance presents a Declaration in which he discusses
19 his observations of his father and his father's business, but does not convey any personal
20 knowledge of the various actions taken by his father or his father's clients' investments. *See* Dkt.
21 #1-1, Ex. C. Mere speculation that a witness speaking on his behalf might have swayed the
22 outcome is speculative, and therefore does not establish prejudice. *See Gonzalez v. Knowles*, 515
23 F.3d 1006, 1015-16 (9th Cir. 2008).
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1 Further, counsel does not have a duty to present evidence that might elicit “aggravating”
2 information that could hurt the defendant’s case. *See Fairbank v. Ayers*, 650 F.3d 1243, 1252–
3 53 (9th Cir. 2011) (explaining that it is not ineffective assistance to decline to call a witness who
4 might open the door to aggravating evidence). Allowing Mr. Dance to present information about
5 his clients and their finances could have appeared as disparaging, and could have ultimately
6 damaged the Court’s view of his character. Thus, defense counsel made a reasonable strategic
7 decision not to introduce the potentially harmful evidence that Mr. Dance now contends should
8 have been presented.
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10 Next, while Mr. Dance objects to one of the witness statements about the cause of his
11 wife’s death, the Court did not sentence Mr. Dance for causing the death of Mrs. Asmussen. The
12 Court expressed its condolences to Mr. Asmussen, but there is no indication in the record that
13 the Court used her death as a factor in the actual term of Mr. Dance’s sentence. *See* Case No.
14 CR15-0349RSM, Dkt. #25. Likewise, Mr. Dance provides no legal authority to indicate that
15 victims are required to make a showing of their financial net worth in order to establish they were
16 harmed by a fraud scheme, and therefore the Court agrees with the government that there is no
17 basis to argue that his counsel “made errors that a reasonably competent attorney acting as a
18 diligent and conscious advocate would not have made.” *Butcher v. Marquez*, 758 F.2d 373, 376
19 (9th Cir. 1985).
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22 Finally, the Court is not persuaded that Mr. Dance’s counsel was deficient because she
23 allegedly directed Mr. Dance not to respond to what Mr. Dance believed were false allegations.
24 Mr. Dance was able to speak to the Court during sentencing. Case No. CR15-0349RSM, Dkt.
25 #25. There is nothing on the record demonstrating that he was precluded from saying what he
26 wanted to say to the Judge at that time. *Id.* For all of these reasons, Mr. Dance has failed to
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1 demonstrate that his counsel was ineffective during the sentencing phase. As a result, Mr.
2 Dance's Petition on Grounds Four, Five and Six fails.

3 *4. Ground Seven*

4 Finally, Mr. Dance argues that these alleged errors, cumulatively, require that his motion
5 be granted and that he be re-sentenced. Dkt. #1-1 at 40-41. Because the Court has determined
6 that there were no errors with respect to counsel's performance at any stage of the proceedings,
7 the Court denies any claim of cumulative error.
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9 **C. Motion to Appoint Counsel**

10 Petitioner has also renewed a prior Motion to Appoint Counsel. Dkts. #2 and #14. In his
11 current motion, Petitioner states, as he did previously, that he is seeking counsel to assist with
12 his habeas petition because he is untrained in the law, he is in custody, and he believes his claims
13 are meritorious. *Id.* In a case brought under 28 U.S.C. § 2255, a district court may appoint
14 counsel in the "interest of justice". 18 U.S.C. § 3006A(a)(2)(B); *Weygandt v. Look*, 718 F.2d
15 952, 954 (9th Cir. 1983). "In deciding whether to appoint counsel in a habeas proceeding, the
16 district court must evaluate the likelihood of success on the merits as well as the ability of the
17 petitioner to articulate his claims *pro se* in light of the complexity of the legal issues involved."
18 *Weygandt*, 718 F.2d at 954. The Court does not find that justice requires the appointment of
19 counsel at this time. First, the issues presented in Mr. Dance's motion are not particularly
20 complex. *See* Dkt. #1-1 (alleging several bases for his claim of ineffective assistance of counsel).
21 Second, the Court has determined that his claims lack merit. Accordingly, Petitioner's Motion
22 to Appoint Counsel (Dkt. #14) will be denied.
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IV. CONCLUSION

Having reviewed Petitioner's motion, the opposition thereto and reply in support thereof, along with the supporting Declarations and Exhibits and the remainder of the record, the Court does hereby find and ORDER:

1. Petitioner's Motion to Vacate Sentence (Dkt. #1) is DENIED.
2. Petitioner's Motion to Appoint Counsel (Dkt. #14) is DENIED.

DATED this 15 day of August, 2017.



RICARDO S. MARTINEZ
CHIEF UNITED STATES DISTRICT JUDGE